IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH.

CEA No.5 of 2005
Date of Decision:-**February ,2010**

Commissioner of Central Excise Commissionerate, Delhi-IV ...Appellant

Versus

M/s Orient Steel Industries, 25th Miles Stone, Mathura Road, Jharsetli, Ballabgarh, District Faridabad.

...Respondent

CORAM: HON'BLE MR.JUSTICE ASHUTOSH MOHUNTA
HON'BLE MR.JUSTICE MEHINDER SINGH SULLAR

Present:- Mr.Sanjeev Kaushik, Advocate for the appellant.

Mr.A.K.Jain, Advocate for the respondent.

Mehinder Singh Sullar, J.

The matrix of the facts, culminating in the commencement and relevant for disposal of present appeal filed by the revenue and emanating from the record, is that the respondent-assessee-M/s Orient Steel Industries Limited (for brevity "the assessee") is engaged in the manufacturing of Hot re-rolled and flat rolled products of Iron or non alloy steel and was paying Central Excise duty at the rate of Rs.300/- per metric tonne per month by availing the benefit of Compound Levy Scheme under section 3A of the Central Excise Act, 1944 (for short "the Act") and sub Rule 3 of Rule 96 ZP of Rule 3 of the Central Excise Rules, 1944 (hereinafter to be referred as "the Rules"). The assessee ostensibly availed the benefit of abatement under sub-section (3) of section 3-A of the Act to the tune of Rs.3,05,956/- for the period October and November 1998 and Rs.5,25,117/- for the period January, 1999 to May, 1999.

2. The revenue claimed that the assessee did not pay the duty, therefore, show cause notices were issued as to why the duty short paid/not paid be not demanded under section 11A of the Act and Rules alongwith interest. The

imposition of penalty was also proposed under Rule 96 ZP of the Rules. In the wake of show cause notices, the assessee filed the reply, in which it admitted the non-payment of duty, but tried to explain that the short payment was on account of difference of opinion, as the assessee claimed the relief for the period when its unit remained closed for more than seven days continuously under section 3A (3) of the Act and this benefit could not be taken away by the Rules. According to the assessee that since there was conflict between the main Act and Rules, so the short payment was only on account of the difference of opinion.

3. The explanation of the assessee did not find favour and the Adjudicating Authority observed that the assessee had wrongly availed the abatement benefit in this case and negatived its claim, vide impugned order dated 25.10.2001 (Annexure P1), the operative part of which is, as under:-

> *"I confirm the demand of Rs.3,05,956/- for the period October and November 98 and Rs.5,25,717/- for the period January 99 to May 99 under proviso to Sub-Rule 3 of the Rule 96 ZP read with Section 11-A of the Central Excise Act, 1944. I also impose a penalty of Rs.8,31,600/- under Sub Rule 1(1) of Rule 96ZP of the Central Excise Rules, 1944. The party is also directed to pay the interest at the appropriate rate under Rule 96ZP read with Section 11AB of the Central Excise Act, 1944."*

4. Aggrieved by the impugned order (Annexure P1), the assessee filed the appeal, which was rejected by the Commissioner (Appeals) Central Excise, vide order dated 31.10.2003 (Annexure P2).

5. In the wake of appeal filed by the assessee, the Customs, Excise & Service Tax Tribunal, New Delhi set aside the impugned order (Annexure P2) and allowed its appeal, vide impugned order dated 3.6.2004 (Annexure P3).

6. The revenue did not feel satisfied with the impugned order Annexure P3 of the Tribunal and filed the present appeal, invoking the provisions of section 35-G of the Act.

7. At the very outset, the learned counsel appearing on behalf of the assessee has raised a preliminary objection, with regard to the maintainability of the appeal. In this regard, the main argument of learned counsel for the assessee that since the question of determination of the value of the goods for the purpose of assessment is involved, so the instant appeal under section 35-G of the Act is not maintainable in this Court, is not only devoid of merit, but misplaced as well. It cannot possibly be denied that two points were urged before the Tribunal i.e. firstly, that both the show cause notices were issued by the Superintendent of Central Excise and not by the competent authority and secondly, that no penalty and interest could be imposed on the assessee under sub-rule 1(A) when the duty had been demanded under sub-rule (3) of Rule 96ZP. The Tribunal, while deciding the first issue, has held that as per circular dated 27.2.1999, only Assistant Commissioner was competent to issue the notices and as the Superintendent was not at all competent to issue show cause notices, so the proceedings taken on the strength of these show cause notices stand vitiated. The Tribunal answered the second issue as under:-

> "*But in the instant case this is not the position. No penalty as observed above has been imposed under sub-rule (3) of Rule 96ZP under which differential duty had been demanded from the appellants. Rather penalty has been imposed under another sub-rule i.e. 1 (A) of Rule 96 ZP under which no duty had been demanded from the appellants.*"

8. It means, question of valuation of the goods does not arise, only law points (legal interpretations) are involved in this appeal. Moreover, the present appeal was admitted to decide the following substantial question of law:-

> *"Board's Circulars being administrative circulars, whether such circulars could take precedence over the Notification and Show Cause Notices issued by virtue of Notifications, rendering the Show Cause Notices invalid if not issued as per Board's Circular."*

9. Thus, it would be seen that pure substantial questions of law are

involved in this appeal. Since the pure question of law (legal interpretations) are involved, so question of determination of the value of the goods for the purpose of assessment did not arise at all. Therefore, the appeal is very much maintainable under section 35-G of the Act and the contrary arguments of learned counsel for the assessee “stricto sensu” deserve to be and are hereby repelled, under the present set of circumstances.

10. Once it is held that the instant appeal is maintainable, then the next short and significant question, though important, arises for determination in this appeal is whether the show cause notices issued by the Superintendent of Central Excise to the assessee are legal or not.

11. Assailing the impugned order (Annexure A3), the learned counsel for the revenue has submitted that as any Central Excise Officer is empowered to issue show cause notices, therefore, show cause notices issued even by the Superintendent were legal and valid. In order to substantiate his argument, he has placed reliance on the judgment of Hon'ble Apex Court in case Pahwa Chemicals Pvt. Ltd. v. Commissioner of Central Excise, Delhi **2005 (181) E.L.T. 339 (SC)**.

12. Hailing the impugned order (Annexure A3), on the other hand, it has been argued on behalf of the assessee that as the Board vide circular dated 27.2.1999 had authorized only the Assistant Commissioner to issue show cause notices, then the show cause notices issued by the Superintendent to the assessee in this case are illegal and the entire subsequent proceedings stand vitiated. He has placed reliance on the judgment in case Paper Products Ltd. v. Commissioner of Central Excise **1999 (112) E.L.T. 765 (S.C.),** in this regard.

13. Possibly, no one can dispute about the law laid down by the Hon'ble Apex Court in Paper Products Ltd.'s case (supra) that the circular issued by the C.B.E. & C. is binding on the departmental authorities and they are precluded from challenging the correctness of the circular even on the ground of same being inconsistent with the statutory provisions. The ratio of the judgment further precludes the right of the Department to file an appeal against the correctness of the binding nature of the circulars and whatever action

department has to take, the same will have to be consistent with the circular, which is in force at the relevant point of time. At the same time, it was also observed that however, the assessee can challenge the validity and legality of departmental instructions.

14. After considering the matter deeply, we are of the view that the observations in Paper Products Ltd.'s case (supra) would not come to the rescue of the assessee in this respect, in view of the law laid down by the Hon'ble Supreme Court in Pahwa Chemicals Pvt. Ltd.'s case (supra). Having interpreted the relevant provisions, it was ruled in para Nos.12, 13 and 14 as under:-

> "*12. As noted above, the Legislature has purposely omitted the word "Collector" from the proviso to Section 11A and replaced it with the words "Central Excise Officer". It is the Act which confers jurisdiction on the concerned Officer/s. The Act permits any Central Excise Officer to issue the show cause notices even in cases where there are allegations of fraud, collusion, willful misstatement and suppression of facts. The question therefore is: Can the Board override the provisions of the Act by issuing directions in the manner in which it is done and if the Board cannot do so then what is the effect of such Circulars?*
>
> *13.In order to consider the powers of the Board one needs to see certain provisions of the Act. Section 2(b) defines the "Central Excise Officer" and it is mentioned therein that any Officer of the Central Excise Department or any person who has been invested by the Board with any of the powers of the Central Excise Officer would be a Central Excise Officer. Thus, the Board has power to invest any Central Excise Officer or any other Officer with powers of Central Excise Officer. By virtue of Section 37B the Board can issue orders, instructions or*

directions to the Central Excise Officers and such Officers must follow such orders, instructions or directions of the Board. However, these directions can only be for the purpose of uniformity in the classification of excisable goods or with respect to levy of duties of excise on such goods. It is thus clear that the Board has no power to issue instructions or orders contrary to the provisions of the Act or in derogation of the provisions of the Act. The Board can only issue such directions as is necessary for the purpose of and in furtherance of the provisions of the Act. The instructions issued by the Board have to be within the four corners of the Act. If, therefore, the Act vests in the Central Excise Officers jurisdiction to issue show cause notices and to adjudicate, the Board has no power to cut down that jurisdiction. However, for the purposes of better administration of levy and collection of duty and for purpose of classification of goods the Board may issue directions allocating certain types of works to certain Officers or classes of Officers. The Circulars relied upon are, therefore, nothing more than administrative directions allocating various types of works to various classes of Officers. These administrative directions cannot take away jurisdiction vested in a Central Excise Officer under the Act. At the highest all that can be said is Central Excise Officer, as a matter of propriety, must follow the directions and only deal with the work which has been allotted to them by virtue of these Circulars. But if an Officer still issues a notice or adjudicates contrary to the Circulars it would not be a ground for holding that he had no jurisdiction to issue the show cause notice or to set aside the adjudication.

14.The Tribunal has in its order dated 25th June, 2003, inter-alia, held as follows:-

> *".....Further, at the relevant time as per the provisions of Section 11A(1) proper officer which includes Superintendent is competent to issue the show cause notice. Board's Circular is only the administrative direction which does not cause any prejudice to the Appellants...."*

In our view this is absolutely correct. We, therefore, see no infirmity in the judgment dated 25th June, 2003. We hold that the Superintendent had jurisdiction to issue show cause notice and the Deputy Commissioner had jurisdiction to adjudicate."

15. Meaning thereby, it has been authoritatively held by the Hon'ble Supreme Court that the Superintendent had jurisdiction to issue show cause notice and the Deputy Commissioner had jurisdiction to adjudicate the matter. Therefore, in view of the pronouncement of the Hon'ble Apex Court, it is held that there is no legal infirmity in issuing show cause notices by the Superintendent to the assessee in the present case as well. Hence, the contrary findings recorded by the Tribunal deserve to be and are hereby reversed.

16. As regards the question of determination of non-payment of duty and on that account, the imposition of penalty is concerned, again, it is not a matter of dispute that the assessee did not pay the entire amount of duty. The explanation put forth by the assessee, with regard to short payment, was that since there was conflict between the Act and the Rules, the benefit granted under any provisions of the Act cannot be taken away by the Rules and, therefore, the short payment of duty was on account of conflict/differences of the opinion and the assessee was not at fault. The plea of the assessee was negatived by the authorities, but the Tribunal did not ostensibly decide the real controversy between the parties in this respect.

17. The matter did not rest there. In some what similar circumstances, the bunch of appeals were decided in favour of the assessee by this Court. The matter was taken to Hon'ble Supreme Court by the revenue and the view taken by this Court was not accepted by the Hon'ble Apex Court. The orders were quashed and the appeals have been remitted back for fresh decision in the light of the judgments of Hon'ble Supreme Court in cases of Union of India and others v. Dharmendra Textiles Processors (**2008) 306 ITR 277 (SC)** and Union of India v. Rajasthan Spinning & Weaving Mills **2009 (238) E.L.T. 3 (SC)**.

18. After remand of the matter, the following two questions of law were decided by this Court on 15.12.2009 in Central Excise Appeal No.60 of 2006 (O&M) titled as "Commissioner of Central Excise Commissionerate, Ludhiana v. M/s B.T.Steels Limited, Village Budhewal, Ludhiana:-

> *ii) Whether penalty imposed under Rule 96ZO (3)(ii) upon a manufacturer of non-alloy steel ingots/billets falling under sub heading Nos.7206.90 and 7207.90 of the Schedule of the Central Excise Tariff Act, 1985 (5 of 1986) and who opted to pay duty under Section 3A of the Central Excise Act, 1944 read with induction Furnace Annual Capacity Determination Rules, 1997, but fails to pay the whole of the amount payable for any month by the 15th day or the last day of such month, as the case may be, is mandatory or discretionary in nature?*
>
> *iii)Whether mandatory equal penalty imposed under Rule 96ZO (3) (ii) can be reduced?*

19. Having interpreted the relevant provisions of the Act vis-a-vis section 3-A and Rule 96 ZP, and judgment of Hon'ble Apex Court in Dharmendra Textiles Processors and Rajasthan Spinning & Weaving Mills's cases (supra) it was held as under:-

> *RE:QUESTION NOS. 2 & 3*
>
> *However, on the aforesaid two questions, the judgment rendered by the Hon'ble the Supreme Court in Dharmendra Textiles case (supra), has direct bearing. It has been categorically held that Rule 96ZO and 96ZQ of the Rules do not contemplate exercise of discretion and the plea that the Rules have inbuilt concept of discretion, has been rejected.*

Hon'ble the Supreme Court has specifically overruled the judgment rendered in ***Dilip N. Shroff v. Joint Commissioner of Income Tax, 2007 (219) ELT 15.*** *In that case it was held that an element of mens-rea was necessary before penalty could be imposed. However, in Dharmendra Textile's case (supra), the aforesaid view has been overruled on the ground that it has failed to take into account the provisions of Section 271 (1)(c) of the Income Tax Act, 1961. It has been laid down that the aforesaid provision was rightly interpreted in the case of* ***Chairman, SEBI v. Shriram Mutual Fund, 2006 (5) SCC 361.*** *Accordingly, in the concluding part, Hon'ble the Supreme Court in Dharmendra Textile's case (supra) has held as under:-*

> *"Above being the position, the plea that the Rules 96ZQ and 96ZO have a concept of discretion inbuilt cannot be sustained. Dilip Shroff's case (supra) was not correctly decided but Chairman, SEBI's case (supra) has analysed the legal position in the correct perspectives. The reference is answered....."*

The judgment in Rajasthan Spinning and Weaving Mill's case (supra) has not deviated from the aforesaid view in respect of Rule 96ZO and, therefore, it continues to hold the field. It is a different matter that in Rajasthan Spinning and Weaving Mill's case (supra), the view taken in Dharmendra Textile's case (supra) in respect of Section 11AC has been further explained. Then it would not result into a conclusion that Dharmendra Textile's case (supra) in so far as Rule 96ZO is concerned, would not hold the field. The aforesaid position has been put beyond any controversy by paragraph no.5 of the judgment subsequently rendered by Hon'ble the Supreme Court in ***Union of India v. Krishna Processors, 2009 (237) ELT 641.*** *Accordingly, we find nothing in the judgment of Hon'ble the Supreme Court in Rajasthan Spinning and Weaving Mill's case (supra) to form an opinion that Rule 96ZO is not mandatory.*

In view of the aforesaid discussion, the provisions for imposing penalty under Rule 96ZO (3)(ii) of the Rules are held to be mandatory and there is no discretion vested in any authority to reduce the aforesaid amount of penalty on the ground that there was no intention of evading payment of duty or commission of fraud, misrepresentation etc. Accordingly,

both the questions no. 2 and 3 are answered against the dealer-respondent and in favour of the appellant-revenue."

20. That means, the provisions of Rule 96 of the Rules were held to be mandatory, but all these aspects have not been considered by the Tribunal in right perspective. Therefore, we are of the view that it would be expedient to remit the matter to the Tribunal for deciding the appeal afresh.

21. In the light of the aforesaid reasons, the present appeal is accepted and the impugned order (Annexure P3) of the Tribunal is hereby set aside. The matter is remitted back to the Tribunal for its decision afresh, in the light of the aforesaid conclusion that the show cause notices issued by the Superintendent are legal and valid and the judgments of Hon'ble Supreme Court in Dharmendra Textiles Processors and Rajasthan Spinning & Weaving Mills's cases (supra) and this Court in M/s B.T.Steels Limited's case (supra). The parties are directed to appear before the Tribunal on 25.3.2010.

(Mehinder Singh Sullar)
Judge

(Ashutosh Mohunta)
Judge

February ,2010
AS

Whether to be referred to reporter? Yes/No